82-814

No. _____

Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term 1982

EUGENE BOFFA, SR.,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MAURICE C. BRIGADIER
Counsel of Record
MARGULIES & MARGULIES, P.A.
A Professional Corporation
921 Bergen Avenue
Jersey City, New Jersey 07306
(201) 963-0700
Attorneys for Petitioner

SEYMOUR MARGULIES
ROBERT E. MARGULIES
On the Petition

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 383
CRANBURY, N.J. 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED FOR REVIEW

1. Can unconnected and unrelated predicate acts constitute the "pattern of racketeering activity" element under RICO, 18 U.S.C. section 1962?

2. May a defendant knowingly and voluntarily waive his Sixth Amendment constitutional guarantee of effective assistance of counsel over the prosecutor's objection, if his trial counsel has an actual conflict of interest since he represented and procured immunity for government witnesses who provided direct testimony resulting in the conviction?

3. Was defendant's right to a fair trial violated when the Court gave no instruction on the nature and theory of the defense in a complex RICO trial though requested by the defense?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
ADOPTION AND JOINDER IN OTHER PETITIONS FILED	2
STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED	2
PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	
A. Procedural History	4
B. Concise Statement of Facts	6
REASONS WHY THE WRIT SHOULD BE GRANTED	13
POINT I THE CIRCUIT COURTS OF APPEAL ARE DIVIDED ON THE ISSUE OF WHETHER THE ELEMENT OF A "PATTERN OF RACKETEERING ACTIVITY" IN AN 18 U.S.C. SECTION 1962 RICO CHARGE REQUIRES THE PREDICATE ACTS TO BE CONNECTED OR RELATED, WHICH ISSUE SHOULD BE RESOLVED BY THE SUPREME COURT.	16

POINT II 30

A CIRCUIT COURT OF APPEALS MAY NOT REFUSE TO CONSIDER ON DIRECT APPEAL PETITIONER'S ASSERTION THAT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN WAIVED WHERE THE PETITIONER'S TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST, AND ELICITED TESTIMONY FROM A GOVERNMENT WITNESS HE HAD REPRESENTED, WHICH WAS USED TO CONVICT THE PETITIONER, AND WHERE THE PROSECUTOR MADE A SPECIFIC OBJECTION TO THE REPRESENTATION.

POINT III 38

THE DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL WAS ABRIDGED WHEN THE DISTRICT COURT REFUSED TO INSTRUCT THE JURY ON THE NATURE AND THEORY OF THE DEFENSE ALTHOUGH A REQUEST WAS MADE FOR AN INSTRUCTION.

CONCLUSION 46

C A S E S	PAGE NO.
Bird vs. U.S., 180 U.S. 356,361, 45 L.Ed. 570,573 (1900)	42, 44
Cuyler vs. Sullivan, 466 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980)	15, 35
Hart v. Davenport, 478 F.2d 203 (CA 3 1973)	33
Strauss vs. U.S., 376 F.2d 416, 419 (CA 5 1967)	43
U.S. v. Blair, 456 F.2d 514, 520 (CA 3 1972)	43
U.S. v. Boffa ____ F.2d ____ (CA 3 1982)	6
U.S. v. Dean, 647 F.2d 779, 788 (CA 8 1981)	22
U.S. v. Elliott, 571 F.2d 880, 899 (CA 5, 1978), cert. denied, 439 U.S. 953 59 L.Ed. 2d 344, 99 S.Ct. 349 (1978)	21
U.S. v. Karas, 624 F.2d 500,503 (CA 4 1980)	22

U.S. v. Lewis,
5 93 F.2d 1282, 1285
(CA 5 1979) 43

U.S. v. Starnes,
644 F.2d 673, 678
(CA 7 1981) 22

U.S. v. Stofsky,
409 F.Supp. 609, 613-614
(S.D.N.Y. 1973),
affirmed on other grounds,
527 F.2d 237 (CA 2 1975),
cert. denied, 429 U.S. 819,
97 S.Ct. 65, 50 L.Ed. 2d 80
(1976) 22,25,26

U.S. v. Turkette,
452 U.S. 576,
69 L.Ed 2d 246,254,
101 S.Ct. 2524 (1981) 22,23

U.S. v. VonRoeder,
435 F.2d 1004 (CA 10 1970) 43

U.S. v. Weisman,
624 F.2d 1118, 1121-1124
(CA 2 1980), cert. denied,
449 U.S. 871,
66 L.Ed. 2d 91,
101 S.Ct. 209 (1980) 21,26

U.S. v. White,
386 F.Supp. 882,
883-884 (D. Wis. 1975) 26

U.S. v. Winn,
577 F.2d 86 (CA 9 1978) 43

Zemina v. Solem,
573 F.2d 1027,1028
(CA 8 1978) 44

R U L E S

F.R.Cr.P 52(b) 19

Supreme Court Rule 19.2 4
Supreme Court Rule 19.4 2
Supreme Court Rule 21.1(b) 1

S T A T U T E S

18 U.S.C. section 1503 4

18 U.S.C. section 1961, 1962, 1963 3

18 U.S.C. section 3575 25

28 U.S.C., section 1254(1) 3

29 U.S.C. section 157 9, 10

29 U.S.C., section 186 4, 17

C O N S T I T U T I O N S

The Fifth Amendment to the United States Constitution 4, 44

The Sixth Amendment to the United States Constitution 4, 30

O T H E R A U T H O R I T I E S

An Explanation of the RICO Statute, p. 44 (4th Ed.) (Strike Force 18, Organized Crime and 26

Racketeering Section, Criminal Division, Justice Department)

5 Arkin, Business Crime, section 24.03 (4) (1982) 28

Atkinson, "Racketeer Influenced and Corrupt Organizations", 18 U.S.C. sections 1961-68: Broadest of the Federal Criminal Statutes, 69 Journal of Criminal Law and Criminology 1, 10-12 (1978). 28

Blakey & Gettings,"RICO: Evening Up the Odds", 16 Trial 58-60 (October 1980) 27

1 Blakey, Techniques in The Investigation and Prosecution of Organized Crime -- Materials on RICO 113 (Cornell Institute on Organized Crime 1980) 27

Bradley, Racketeers, Lawyers, and the Courts: An Analysis of RICO, 65 Iowa L.Rev. 837,862-5 (1980) 28

3 Criminal Defense Techniques, section 62A.04(2) at page 62A-10 (1982) 27

2 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d Ed., section 56.20 at p. 620 (1981 cum.supp.) 27

8A Moore's Federal Practice - Criminal, section 30:03 at p. 30-7, section 30.05 at p. 30-24 (1981) 44

Note, 19 American Criminal Law Review 351 (1981) 27

Note, 12 Rutgers Law Journal 69,88 (1980) 29

Novotny, Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation, 27 DePaul Law Review 89, 105 (1977) 28

5 Orfield, Criminal Procedure under The Federal Rules, section 30:37, pp 65-66 (1967 and 1981 Supp.) 44

Pattern Jury Instructions Criminal Cases 132, (U.S. 5th Circuit District Judges Association - West 1979) 27

Schmidt, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the 28

Confusion in its Application and a Proposal for Reform, 33 Vanderbilt Law Review 441, 452 (1980)

Seminar, RICO and Mail Fraud Cases, p. 5 (ABA Dallas, Texas Annual Meeting 1979) 29

9 U.S. Attorneys' Manual, Ch. 110, p. 5 (1977) 26

Webster's New International Dictionary, 2d Ed. (Merriam 1948) 24

APPENDIX CONTENTS

	PAGE
APPENDIX A - Opinion, U.S. v. Boffa _____ F.2d _____ (Ca 3 1982)	1a
APPENDIX B - Judgment of Third Circuit Court of Appeal August 25, 1982	41a
APPENDIX C - Petition for Rehearing Denial September 24, 1982	44a
APPENDIX D - Letter Memorandum by Prosecutor to District Court September 30, 1980	46a
APPENDIX E - 18 U.S.C. section 1503	50a
APPENDIX F - 18 U.S.C. section 1961, 1962, 1963	51a
APPENDIX G - 29 U.S.C. section 186	55a
APPENDIX H - Fifth Amendment to the Constitution of the United States	59a
APPENDIX I - Sixth Amendment to the Constitution of the United States	60a

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO.

EUGENE BOFFA, SR.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Eugene Boffa, Sr.* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed his judgment of conviction

*Pursuant to Supreme Court Rule 21.1(b), the other co-defendants below were Louis Kalmar, Sr., Robert Boffa, Sr. and Chandler Lemon.

entered upon a jury verdict of guilt.

ADOPTION AND JOINDER IN OTHER PETITIONS FILED

Pursuant to Supreme Court Rule 19.4, the petitioner Eugene Boffa, Sr. respectfully adopts and joins in the petition for writ of certiorari filed by co-defendant Louis Kalmar, Sr.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner Eugene Boffa, Sr. seeks a writ of certiorari to review the judgment (App. 41a)* rendered in accordance with an opinion (App. 1a) of the United States Court of Appeals for the Third Circuit on August 25, 1982. The judgment modified and remanded a criminal sentence and orders for fines and forfeitures imposed on the petitioner by the District Court of the District of

*App. refers to the Appendix to this Petition annexed.

Delaware following a jury trial. The Third Circuit Court of Appeals affirmed those portions of the District Court's orders from which petitioner seeks review in the Supreme Court.

A petition for rehearing en banc was denied by the Third Circuit Court of Appeals (App. 44a) on September 24, 1982.

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C., section 1254(1).

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes set forth in the Appendix are pertinent:

18 U.S.C. section 1961, 1962, 1963, The Racketeer Influenced Corrupt Organi-

zation Act; 18 U.S.C. section 1503, Obstruction of Justice; 29 U.S.C. section 186, Taft-Hartley Act.

The following constitutional provisions set forth in the Appendix are pertinent:

The Fifth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Procedural History

On June 8, 1981, the petitioner was convicted of a RICO conspiracy (Indictment Count I), a RICO substantive charge (Count II) and seven counts of mail fraud (Counts V through XI) (A 48-79).*

The conspiracy and substantive RICO

*A refers to Court of Appeals Appendix, copies of which have been certified for transmission to this Court pursuant to Supreme Court Rule 19.2.

counts were predicated on the seven mail fraud counts and on five Taft-Hartley and one obstruction of justice predicate crimes which were not charged as separate substantive counts.

The petitioner was sentenced to two concurrent twenty-year custodial terms on Counts I and II and seven consecutive sentences on the mail fraud counts totalling nineteen years ten months to be served concurrently with the RICO counts, a $47,000.00 fine and to forfeitfure of his interest in nine corporations which were not party defendants.

The Third Circuit Court of Appeals affirmed the convictions on RICO and RICO conspiracy based on five Taft-Hartley and one obstruction of justice predicate crimes and reversed the seven counts of mail fraud remanding them for a new trial

U.S. v. Boffa, _____ F.2d ____ (CA 3 1982) (App. 1a.) It vacated the entire sentence, fine and forfeiture orders and directed the District Court to resentence petitioner on both RICO counts in light of the invalidation of those mail fraud counts which were predicates of the RICO counts.

B. Concise Statement of Facts

Petitioner's conviction was based on the following scenario. Petitioner operated Universal Coordinators Inc. (U.C.I.), a labor-leasing company, servicing, among other of its customers, Crown-Zellerbach Corporation, Inland Container Corporation and Continental Can Corporation. These customers required truck delivery of their goods from their plants to points throughout the country.

If they used their own trucks and drivers, they had to negotiate with unions which represented the drivers. This posed the host of problems incident to labor negotiations, including the risk of strikes which would interfere with their business operation.

U.C.I., one of many labor-leasing companies in the country, was designed to shield its customers from these problems and risks. Labor leasing companies supply drivers and as their employer attend to the problems of negotiating with the union. They also attended to all other employee benefit matters such as payrolls, withholding, social security, workers compensation, etc. The petitioner also controlled All Purpose Leasing (A.P.L.) which was a motor vehicle leasing corporation.

The jury found that in three separate instances petitioner or a co-defendant and U.C.I. conspired with a labor union official (in two instances with severed co-defendant Sheeran) to get a sweetheart contract for U.C.I. This enabled U.C.I. to assure each of its three customers involved in each of these three instances, of labor peace for a fee.

The jury found that when the drivers complained of inadequate benefits, the defendants purportedly gave up their contracts with their customers, fired the drivers from U.C.I. and then caused new labor-leasing companies which were "franchisee" operations secretly controlled by Boffa to be brought in to get the same work contract from the customer and "rehire" drivers under new labor

contracts which, again, were sweetheart deals. Through this alleged scam, the same type operation was said to continue, notwithstanding the change in form.

The mail fraud charges were pleaded as seven independent counts and twenty-three of the sixty-three predicate RICO acts which sprang from the false notices of termination. The false firing was said to defraud the drivers of (1) the loyal, faithful, and honest services of the union official; (2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act (NLRA), 29 U.S.C. section 157; and (3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement.

The Third Circuit found as a matter of law that the statutory rights

guaranteed by the NLRA, 29 U.S.C. section 157 could not be a basis for a mail fraud; hence the reversal of all mail fraud counts and those parts of the RICO counts where mail fraud was the predicate act.

At trial the defendants asserted by way of defense, both through cross examination and essentially through co-defendant Kalmar's testimony, that the relationship between petitioner and the franchisees, (which were alleged by the Government to be "alter egos"), were in fact arms-length legitimate franchise transactions where petitioner and Kalmar had an interest in the franchisor and in fact provided actual consulting services to the franchisee. The asserted basis for each of the instances of employee termination was economic necessity in

that the UCI operations had become no longer profitable.

There were two categories of Taft-Hartley RICO predicate acts. Racketeering Acts 40-43 charged that in 1975 co-conspirator Kalmar had given several months of free use of a Lincoln Continental to Sheeran, the union official. Racketeering Act 51 charged that in 1976 petitioner and Kalmar caused APL to sell the Lincoln to Sheeran for less than its fair market value in order to corruptly influence him as a union official.

The RICO predicate act of obstruction of justice (Racketeering Act 53) was that in 1975 Boffa caused the ledger books of APL to be rewritten in anticipation of submitting them under a subpoena to a federal grand jury. The

alteration reflected payments made directly to Boffa by Sheeran in cash for the car rental, which payments had not previously been reflected in the books.

There was no charge in the indictment nor was there evidence to suggest a connection or relationship between the 1975 alteration of the records (obstruction) and the subsequent 1976 sale of the Lincoln (Taft Hartley). No jury instructions suggested that these predicate RICO acts had to be connected or related to constitute a "pattern of racketeering activity".

Legal and factual defenses were proffered to the Taft-Hartley and to the obstruction charges.

Petitioner is to be resentenced on the RICO counts based on the predicate

acts concerning obstruction, and the Taft-Hartley acts concerning the free use and the sale of the vehicle.

(Because the facts relating to the Sixth Amendment issue are separable from the RICO trial issues, they are set forth, post, in Point II.)

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) In affirming the judgment of the District Court, the Court of Appeals refused to consider the issue raised on appeal of whether the RICO element of "pattern of racketeering activity" requires the predicate acts to be connected or related. The District Court did not tell the jury that the predicate acts must be related or connected. Instead, it charged that criminal liability for RICO violations could be found if any two

acts were committed within ten years. The Third Circuit has no direct holding on the meaning of "pattern of racketeering activity". The Circuits are in conflict as to whether relatedness or connection of predicate acts is necessary to prove the "pattern" element.

(2) The petitioner was represented by trial counsel who had an actual conflict of interest because he cross-examined government witnesses whom he had previously represented and for whom he had obtained immunity incident to the same transactions for which petitioner was tried and convicted. The Court of Appeals would not consider the constitutional error posed even though the issue was directly raised by the government in the District Court. The Circuit Court's departure from the ruling

of Cuyler v. Sullivan, 466 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980) calls for an exercise of the Supreme Court's supervision so as to prevent a manifest injustice.

(3) The petitioner, in a complex and lengthy RICO prosecution, had requested that the District Court inform the jury as to the nature and theory of petitioner's defense. In the seventy-five transcribed pages of the jury instructions, which were physically submitted to the jury during deliberations, there is no reference to the defense. The petitioner asserts that the omission was of such fundamental due process magnitude as to invoke this Court's supervisory power.

POINT I

THE CIRCUIT COURTS OF APPEAL ARE DIVIDED ON THE ISSUE OF WHETHER THE ELEMENT OF A "PATTERN OF RACKETEERING ACTIVITY" IN AN 18 U.S.C. SECTION 1962 RICO CHARGE REQUIRES THE PREDICATE ACTS TO BE CONNECTED OR RELATED, WHICH ISSUE SHOULD BE RESOLVED BY THE SUPREME COURT.

The petitioner was tried on facts alleging three separate and distinct mail fraud transactions involving a switch of labor leasing companies at Crown-Zellerbach Corporation, Inland Container Corporation and Continental Can Corporation. The enterprise element of RICO was alleged to be a number of individuals, including petitioner, and not the corporations, through which it was alleged the switches took place. The indictment structured the RICO predicate acts for both the RICO conspiracy and RICO substantive charge on (1) mail

fraud, by various defendants having mailed termination notices to employees at all three facilities (2) 29 U.S.C. section 186, Taft-Hartley violations alleging the influencing of a union official by delivering free use of a 1975 Lincoln Continental and (3) the sale of that vehicle to the union official below fair market value, and (4) obstruction of justice by petitioner having turned over false and fictitious records of APL to a grand jury in violation of 18 U.S.C. section 1503. (App. 50a)

The District Court in charging the jury explained that "pattern of racketeering activity" was an essential element of the offense (A-288; T. P-105:23-24). "Pattern of racketeering activity" was defined as the commission of two crimes of racketeering activity

within a ten year period noting the example that " ... an individual who committed two robberies within a ten-year period could be said to have engaged in a pattern of racketeering activity" (T. P-81:19-24; A-264; P-110:4-81 A-293).

The District Court told the jury:

> "As I have explained, the indictment specifies sixty-one acts of racketeering activity alleged to have been committed by the defendants as part of a pattern of racketeering activity. The racketeering acts, alleged acts, allege violations of the Mail Fraud Statute, the Taft-Hartley Act, and obstruction of Justice. Each racketeering act alleges a separate and distinct violation of one of those laws. Thus, the pattern of racketeering activity element is satisfied if the defendant whom you are considering willfully participated in the affairs of the enterprise through the commission of at least two of the racketeering acts charged in the Indictment, and those two acts occurred within ten years of each other." (A-292;

T. P-109:13-24). (Emphasis added).

The District Court did not require that the jury find a relatedness or connection between the predicate crimes. No objection was made to the charge on this ground in the District Court, but the issue was squarely raised before the Court of Appeals as plain error under F.R.Cr.P 52(b). The Court of Appeals held:

> "Because appellants do not assert that the predicate acts charged in the indictment were in fact unrelated, they cannot argue that they have been prejudiced by the District Court's failure to give the instruction they now argue was necessary" (App. 35a).

The petitioner asserts that the relatedness issue was factually addressed to the Court of Appeals. Petitioner's Court of Appeals brief stated there were

"three major and separate factual transactions" which were described in some detail. The second point heading of petitioner's main brief on appeal squarely raised the issue:

> The Charge Erroneously Permitted The Jury To Find Unrelated Acts Of Racketeering As The Basis For The Requisite Pattern Of Racketeering On The RICO Substantive And Rico Conspiracy Charges.

Specifically, no proofs were presented against Eugene Boffa, Sr. with respect to the allegations of the indictment that relate to the Continental Can Corporation transaction in Van Wert, Ohio. There was a jury question as to whether the Taft-Hartley predicate crimes or the obstruction of justice predicate crime were related to the mail fraud schemes encompassed by the mailing of termination notices to employees.

Certainly there is no relationship between the sale of the Lincoln Continental below market value (Taft-Hartley Racketeering Act 51) in 1976 and the 1975 obstruction of justice (Racketeering Act 53). Yet, the current exposure on both RICO counts is based on the predicate obstruction and Taft-Hartley acts.

The Circuit Courts of Appeal are split on the issue of whether "pattern of racketeering activity" requires a demonstration that predicate criminal acts be related or connected. The Second Circuit and the Fifth Circuits do not require relatedness or connection of predicate acts; U.S. v. Weisman, 624 F.2d 1118, 1121-1124 (CA 2 1980), cert. denied, 449 U.S. 871, 66 L.Ed. 2d 91, 101 S.Ct. 209 (1980); U.S. v. Elliott, 571 F.2d 880,

899 (CA 5 1978), cert. denied, 439 U.S. 953, 59 L.Ed. 2d 344, 99 S.Ct. 349 (1978). The Fourth, Seventh and Eighth Circuits do require relatedness between predicate acts to establish the "pattern of racketeering activity" element of RICO; U.S. v. Karas, 624 F.2d 500,503 (CA 4 1980); U.S. v. Starnes, 644 F.2d 673, 678 (CA 7 1981); and U.S. v. Dean, 647 F.2d 779, 788 (CA 8 1981) (heard en banc).

This court in dictum in U.S. v. Turkette, 452 U.S. 576, 69 L.Ed 2d 246,254, 101 S.Ct. 2524 (1981) discussed the element "pattern of racketeering activity" noting:

> "In order to secure a conviction under RICO, the Government must prove the existence of an 'enterprise' and the connected 'pattern of racketeering activity'. The enterprise is an entity, for present purposes

> a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. section 1961(1)", 452 U.S. at 583, 69 L.Ed. 2d at 254. (Emphasis added)

Although this Court held that under RICO the "enterprise" must be found to be connected with the "pattern of racketeering activity", it did not directly consider whether the "pattern of racketeering activity" additionally required related predicate acts for criminal liability. No reported case has discussed the affect of U.S. v. Turkette on the issue that is posed. Two things are significant about Turkette: (1) At footnote 5, this Court cites from the "Government's position" which is essentially taken from the legislative

history of RICO that " ... any two sporadic and isolated offenses by the same actor or actors ipso facto (do not) constitute an 'illegitimate' enterprise ..."; (2) "pattern of racketeering activity" is defined as " ... a series of criminal acts as defined by the statute." Series, as defined in Webster's New International Dictionary, 2d Ed. (Merriam 1948) means "a number of things or events standing or succeeding in order, and connected by a likely relation". (Emphasis added) The plain meaning of "pattern" requires the connection or relatedness between predicate acts.

The controversy over the meaning of the "pattern of racketeering activity" element of RICO began with U.S. v. Stofsky, 409 F.Supp. 609, 613-614 (S.D.N.

Y. 1973), affirmed on other grounds 527 F.2d 237 (CA 2 1975), cert. denied, 429 U.S. 819, 50 L.Ed. 2d 80, 97 S.Ct. 65 (1976), where the Court construed the word "pattern":

> " ... as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts" 409 F.Supp. at 614. (Emphasis added)

The Stofsky Court recognized that the word "pattern" " ... is relatively new to the legislative criminal lexicon" (409 F.Supp. at 613) and relied upon the construction aid of in pari materia between RICO and the Organized Crime Control Act of 1970, 18 U.S.C. section 3575, as well as the legislative history of RICO which permits the aggregation of minor crimes to subject an individual to

an enhanced punishment. The Court considered that it was otherwise possible to charge two misdemeanors which would subject a member of the "enterprise" to a twenty year prison term, a $25,000.00 fine and substantial forfeitures if the misdemeanors were committed within a ten year period. In fact, that is what happened at bar. As noted above, the Stofsky position on "pattern" has been overruled, U.S. v Weisman, supra. See also, U.S. v. White, 386 F.Supp. 882, 883-884 (D. Wis. 1975).

The United States has taken the position in 9 U.S. Attorneys' Manual, Ch. 110, p. 5 (1977) that " ... nexus or relationship between the acts of racketeering charged must be proved to establish the pattern". Accord, An Explanation of the RICO Statute p. 44

(4th Ed) (Strike Force 18, Organized Crime and Racketeering Section, Criminal Division, Justice Department); Pattern Jury Instructions Criminal Cases 132 (U.S. 5th Circuit District Judges Association - West 1979).

Numerous other authorities have concluded that relatedness or connection between predicate acts is essential: 2 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d Ed., section 56.20 at p. 620 (1981 cum.supp.) 1 Blakey, Techniques in The Investigation and Prosecution of Organized Crime -- Materials on RICO 113 (Cornell Institute on Organized Crime 1980), 3 Criminal Defense Techniques, section 62A.04(2) at page 62A-10 (1982), Note, 19 American Criminal Law Review 351 (1981), Blakey & Gettings, "RICO: Evening Up the Odds", 16

Trial 58-60 (October 1980), Novotny, Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising In Its Interpretation, 27 DePaul Law Review 89, 105 (1977), Schmidt, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform, 33 Vanderbilt Law Review 441, 452 (1980), 5 Arkin, Business Crime, section 24.03 (4) (1982); Atkinson, "Racketeer Influenced and Corrupt Organizations", 18 U.S.C. sections 1961-68: Broadest of the Federal Criminal Statutes, 69 Journal of Criminal Law and Criminology 1, 10-12 (1978). Bradley, Racketeers, Lawyers, and the Courts: An Analysis of RICO, 65 Iowa L.Rev. 837,862-5 (1980).

At least one authority has concluded

that pattern does not require related acts. Note, 12 Rutgers Law Journal 69,88 (1980).

The division of authority in the Circuit Courts of Appeal on the RICO "pattern of racketeering" issue requires resolution by the Supreme Court not only because the legislation is relatively new but also because of the wide use by the Government of the RICO prosecution tool which carries a significantly enhanced penalty provision. Analogizing RICO to Judge Learned Hand's comment that conspiracy is the " ... darling of the modern prosecutor's nursery", a participant in the American Bar Association seminar on RICO and mail fraud cases indicated "if that's true, then RICO is the illegitimate step-child of that nursery" Seminar, RICO and Mail

Fraud Cases, p. 5 (ABA Dallas, Texas Annual Meeting 1979).

POINT II

A CIRCUIT COURT OF APPEALS MAY NOT REFUSE TO CONSIDER ON DIRECT APPEAL PETITIONER'S ASSERTION THAT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN WAIVED WHERE THE PETITIONER'S TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST, AND ELICITED TESTIMONY FROM A GOVERNMENT WITNESS HE HAD REPRESENTED, WHICH WAS USED TO CONVICT THE PETITIONER, AND WHERE THE PROSECUTOR MADE A SPECIFIC OBJECTION TO THE REPRESENTATION.

The Third Circuit Court of Appeals declined to consider the petitioner's assertion that he was denied effective assistance of counsel inconsistent with the petitioner's Sixth Amendment constitutional guarantee of counsel

"because this issue was not raised in the District Court ...". (App. 37a)

The petitioner was represented by trial counsel James Schwartzman, who cross-examined two key government witnesses, Carmela Tentoni and Joan Dressler. Petitioner's trial counsel had represented both Tentoni and Dressler before the grand jury and had obtained immunity for them. Each testified for the Government.

The critical testimony elicited from them was that the petitioner had directed the government witnesses to change the records of APL to reflect payments by the union official Sheeran before submission of the records to the grand jury, which payments were not made. The evidence was critical to the jury's determination that petitioner was guilty of the four

Taft-Hartley racketeering acts of giving free use of a 1975 Lincoln Continental to Sheeran in order to influence his actions. The petitioner, on the advice of counsel, did not testify on his behalf at trial. By having entered a "not guilty" plea, he denied the transactions.

The government in a pre-trial letter memorandum to the District Court (App 46a) brought the actual conflict of interest of petitioner's trial counsel to the District Court's attention:

> "What is relevant and, indeed, critical, is the fact that the witness has made disclosures which by virtue of the attorney-client relationship are privileged. In the case of the witness for whom Mr. Schwartzman obtained immunity, that representation is obviously adverse to Mr. Boffa's interest. It would appear that these two factors create an actual conflict of interest." (Emphasis added)

The District Court held a "Davenport" hearing (Hart v. Davenport, 478 F.2d 203 (CA 3 1973) (A - 1007)) at which time "waivers" were elicited from all co-defendants and their counsel. The petitioner's trial counsel had also represented the co-defendants in the grand jury proceedings. The District Court relied upon Mr. Schwartzman's assertion that he could adequately cross-examine the government-immunized witnesses without prejudicing his prior representation of them or his representation of petitioner (A - 1025-1026), as well as Mr. Schwartzman's statement that the petitioner understood the potential conflicts. The District Court merely asked the appellant whether he understood the colloquy between counsel and Court (A 1026-1029). Since Mr. Schwartzman had, as recognized and

raised by the government, an actual conflict of interest, the petitioner relied upon his then counsel, without independent representation, as did the District Court in concluding that the waiver was made intelligently and knowingly. There was no way that the petitioner could realistically have raised the issue in the District Court as was seemingly required by the Circuit Court.

There are two possibilities with respect to the Circuit Court's ruling on this issue: (1) The Circuit Court may have meant that it considered the "waiver" by the petitioner without independent representation as binding in that it was made knowingly and intelligently; (2) the Circuit Court may have considered that there was no actual

conflict of interest as required by Cuyler vs. Sullivan, 466 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980) -- this is unlikely since the Circuit Court's opinion did not allude to that.

Cuyler v. Sullivan, supra, was a Third Circuit case where the Court of Appeals had held that a multiple representation of three criminal defendants by two attorneys in a State Court proceeding created the possibility of conflict sufficient to invoke prejudicial error by the application of the Sixth Amendment. This Court held that:

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

. . . . .

> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel'. 315 U.S. at 76, 86 L.Ed. 680, 62 S.Ct. 457. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway supra, at 487-491, 55 L.Ed. 2d 426, 98 S. Ct. 1173. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser supra, at 72-75, 86 L.Ed. 680, 62 S.Ct. 457." 446 U.S. 348-350. (Emphasis added)

Since the petitioner has demonstrated an actual conflict of interest at

bar which directly relates to those parts of the conviction still standing i.e., the Taft-Hartley predicate RICO acts of influencing a union official by providing free use of an automobile, and the obstruction of justice RICO predicate act, the purported "waiver" as a matter of law could not have been made knowingly and intelligently. There was no independent representation of the petitioner when the purported "waiver" was made. The petitioner necessarily relied upon his trial counsel who represented to the Court that he could adequately cross-examine Government witnesses in permitting the representation to continue.

POINT III

THE DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL WAS ABRIDGED WHEN THE DISTRICT COURT REFUSED TO INSTRUCT THE JURY ON THE NATURE AND THEORY OF THE DEFENSE ALTHOUGH A REQUEST WAS MADE FOR AN INSTRUCTION.

The defendants were tried on a complex RICO conspiracy, a RICO substantive charge and substantive mail fraud charges. The trial took five weeks. The indictment was over thirty-two pages on long pleading paper (A-48). The Government presented extensive testimony consistent with its theory of the case and the defendants produced a very substantial defense. The defendant's theory of defense was that collective bargaining agreements were terminated with the unions in each

instance because the specific trucking operations were no longer economically feasible due to the pressures of the market place. At various times, U.C.I. was replaced by different "Countrywide" franchise operators. These franchise operators negotiated substitute contracts with the Teamster Locals and in one case a BRAC local. The Government alleged the replacement of U.C.I. was an illegal scheme. The defendants asserted that their conduct was lawful and necessitated by economic pressures of the market place. The defendants asserted that their labor-leasing business was a legitimate operation. The Government conceded only that "labor leasing" may be a legitimate business.

The defendants requested that the District Court instruct the jury on the

theory of the defense (A-198; A-218), which it refused to do.

To place the gravity of the error in perspective, it is noted that the charge (A 258-332) encompasses seventy-five transcribed pages (T. P-75 to 150; A-258). Of that charge, the District Court undertook to factually summarize the government's theory of the case by reviewing in depth the allegations of the indictment in twenty-four pages of the charge (T. P 80-104; A-263). Throughout the balance of the charge, the Court constantly alluded, in an explanation of the law, to the facts alleged in the indictment and utilized the indictment as an outline from which the applicable law was delivered to the jury. It never once referred to the defense. The Court sent the physical copy of the indictment and

the charge into the jury room. The jurors had nothing before them containing the defendants' contentions.

Because of the length of the trial, and the complexity of the transactions which were the basis for the alleged criminal culpability, and the length of the charge (Court's comment -- "Well, that was a long one"), the petitioner respectfully complains that not to have given the defense theory, which was supported by a substantial amount of testimony and evidence offered on defendants' behalf, was fundamental and prejudicial error.

RICO carries aggravated and enhanced penalties. The very nature of a "racketeering" charge is onerous. To be deprived of the essentials of a defense at a critical point in the trial is

fatal.

This Court in Bird vs. U.S., 180 U.S. 356,361, 45 L.Ed. 570,573 (1900) held that the trial court must inform the jury fairly, not only on the applicable law but " ... the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues" (Emphasis added). In Bird, there was no request by the defendant, yet the Court reversed the judgment of conviction finding that the failure to have properly instructed was "fundamental". Bird recognized that it was not enough for the trial court to have instructed that the sovereign prove its case "beyond a reasonable doubt"; Bird expressly required that the Court charge the defense concept of alibi, even

though it had charged the elements of the crime, one of which, i.e., presence at the time and place of the crime, was factually consistent to the defense contention of alibi. It was not enough to charge that the burden is on the Government and omit the defendant's contentions.

The failure to give a charge which evaluates the government's case without vocalizing the proposed defense is in effect the direction of a verdict against the defendant. A defense instruction when requested must be given even where the defense is fragile: Strauss vs. U.S., 376 F.2d 416, 419 (CA 5 1967), U.S. v. Blair, 456 F.2d 514, 520 (CA 3 1972), U.S. v. Lewis, 593 F.2d 1282, 1285 (CA 5 1979), U.S. v. Winn, 577 F.2d 86 (CA 9 1978); U.S. v. VonRoeder, 435 F.2d

1004 (CA 10 1970), Zemina v. Solem, 573 F.2d 1027,1028 (CA 8 1978). See also, 5 Orfield, Criminal Procedure under The Federal Rules, section 30:37, pp 65-66 (1967 and 1981 Supp.); 8A Moore's Federal Practice - Criminal, section 30:03 at p. 30-7, section 30.05 at p. 30-24 (fn. 13) (1981).

A deviation from the standard of Bird v. U.S., supra is of constitutional magnitude in that it violates the fundamental fair trial requirement of the Fifth Amendment to the United States Constitution. (App. 59a)

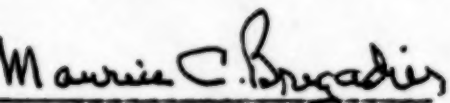
We acknowledge in this Point III that error, per se, no matter how grave, alone might not provide a basis for a writ. However, this point is respectfully submitted, together with the writ grounds in Points I and II, to

demonstrate that the matter is not merely of jurisprudential import -- it arises in a case wherein the petitioner simply did not get a fair deal. The summary ruling of the Third Circuit that "We have examined these contentions in light of the entire record and find no reversible error." (App. 38a) simply fails to accord the petitioner the essentials of a fair trial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

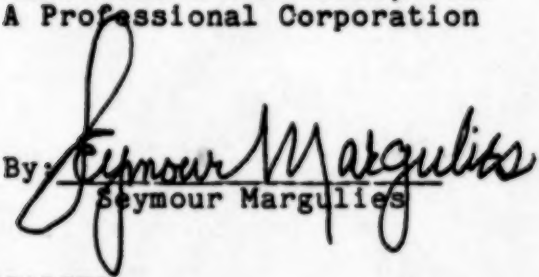
Respectfully submitted,



Maurice C. Brigadier

and

MARGULIES & MARGULIES, P.A.
A Professional Corporation

By: 
Seymour Margulies

MAURICE C. BRIGADIER
Of Counsel

SEYMOUR MARGULIES
ROBERT E. MARGULIES
On The Petition

November 1, 1982